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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 478

JEREMIAH STAMLER, M.D., AND YOLANDA F. HALL, APPELLANTS

v.

HON. EDWIN E. WILLIS, ET AL.

No. 479

MILTON M. COHEN, APPELLANT

v.

HON. EDWIN E. WILLIS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1) of this Court, the Solicitor General, on behalf of respondents, moves that the appeal from the judgment of the three-judge district court be dismissed, or that the judgment be affirmed.

STATEMENT

On March 18, 1965, the House Committee on Un-American Activities (the Committee) resolved to hold

hearings in Chicago, Illinois, concerning the organization and operation of the Communist Party in that area.[1] In accordance with Rule XIV of the Commit-

[1] *Be it resolved*, That hearings be held by the Committee on Un-American activities or a subcommittee thereof, at such times and places as the Chairman may determine, and that the staff be authorized to conduct investigations deemed reasonably necessary in preparation therefor, relating to:

1. As concerns the Chicago, Illinois area and the Illinois District of the Communist Party of the United States; the structure and organization of the Communist Party of the United States; its major objectives, and the strategical and tactical methods designed to aid in accomplishing such objectives; the major areas of Communist Party concentration; organizations created and controlled by the Communist Party to advance the policies and objectives of the Communist movement; Communist propaganda activities conducted in support of such objectives; and conspiratorial activities in aid of, or in association with, foreign Communist governments; and also like information regarding other Communist organizations in the Chicago, Illinois area, for the following legislative purposes:

(a) to provide factual information to aid the Congress in the proposal of any necessary remedial legislation in fulfillment of the directions contained in the mandate to the Committee by House Resolution 8, of January 4, 1965, and Public Law 601 of the 79th Congress;

(b) to assist the Congress in appraising the execution by the administrative agencies concerned of Title I of the Internal Security Act of 1950;

(c) to provide factual information to aid the House in the disposition of presently pending and proposed legislation, including, but not limited to, H.R. 4293, a bill to amend the Subversive Activities Control Act of 1950 so as to authorize the Federal Government to bar from access to defense facilities individuals who may engage in sabotage, espionage, or other subversive acts;

(d) consideration of the advisability of amending the Internal Security Act so as to impose certain disabilities, in the manner and form therein provided, upon those per-

tee's Rules of Procedure (Revised 1961), Chairman Edwin E. Willis appointed a subcommittee of five members with himself as chairman to conduct the hearings (Hearings, p. 329). Appellants were subpoenaed to appear before the Committee in Chicago on May 25, 1965. Appellants Stamler and Hall then filed suit, alleging that Rule XI of the Rules of the House of Representatives,[2] under which the Committee has been conducting its investigations, violates the First and Fifth Amendments and that the Committee had subpoenaed them "for the purpose of embarrassing, harassing and intimidating [them] and to deter [them] from the exercise of their rights, privileges and immunities as citizens of the United States, and in particular their rights to freedom of belief, speech, press, assembly and association guaranteed by the First Amendment" (App. 1, pp. 5–12).[3] They requested the convening of a three-judge district court; that the Committee be enjoined from operating in any manner under Rule XI; that the coming hearing be

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sons "affiliated with" Communist organizations as well as upon persons who are members thereof.

Be it further resolved, That the hearings may include any other matter within the jurisdiction of the Committee which it, or any subcommittee thereof, appointed to conduct these hearings, may designate.

Exhibit 50 to the complaint, printed as a Supplemental Appendix on the appeal (hereafter "Hearings"), p. 326.

[2] As embodied in the Legislative Reorganization Act of 1946, 60 Stat. 823.

[3] "App. 1" refers to Appellants' Appendix in Nos. 15268, 15269 in the Seventh Circuit, appeals from the initial dismissal of the suit. "App. 2" refers to Appellants' Consolidated Appendix in Nos. 15268, 15269, 15668 and 15669 in the Seventh Circuit, appeals from the dismissal of the amended complaint.

declared "illegal and void"; and that the subpoenas served on them be quashed (App. 1, pp. 12–14). Appellant Cohen filed his petition for leave to intervene on the same day; it was granted without objection (App. 1, pp. 38–39).

At the conclusion of a hearing on a motion for a temporary restraining order and for the convening of a three-judge district court, the judge ruled orally that the challenge to the constitutionality of Rule XI was foreclosed by *Barenblatt* v. *United States,* 360 U.S. 109, and that no substantial federal question warranting a three-judge court was presented. He directed that the complaint be dismissed (App. 1, pp. 43–52).

The plaintiffs appeared for the Committee's sessions, and were called, among other witnesses, to testify. Their request for an executive session was denied (Hearings, pp. 538–542). After each was sworn and gave his name and address, he was asked to state the date and place of his birth; each then refused, on the advice of counsel, to cooperate with the Committee or to give any further testimony while the litigation challenging the Committee's power to proceed was pending (as it then was in the court of appeals). Each left the hearing room at this juncture (Hearings, pp. 547–552), without awaiting the questions which it is now argued would have been defamatory.

After denial of a motion to have the appeals remanded to the district court for the purpose of supplementing the complaint (App. 1, p. 112), appellants instituted two new actions in which an expanded complaint was filed. In addition to the relief which

had been sought in the first complaint, appellants asked for an injunction against the institution of contempt proceedings arising out of plaintiffs' appearances (compare App. 1, pp. 12–14, with App. 2, pp. 46–47). A three-judge district court was again requested and denied. The complaint was dismissed in a memorandum decision (App. 2, pp. 117–134), holding that insofar as the complaint sought an injunction against contempt proceedings it was premature and failed to include the United States as a party; if plaintiffs were entitled to relief they could obtain it when and if the Speaker of the House of Representatives certified their contempt for prosecution under 2 U.S.C. 192. As for the challenge to the constitutionality of Rule XI, the judge held that the plaintiffs were in no immediate danger of future interrogation by the Committee and that, consequently, they had no more standing to bring the suit at that juncture than did any bystander.

On a consolidated appeal from the orders dismissing the two complaints, the court of appeals vacated the judgment of dismissal and held that the district judge had "exceeded the single-judge preliminary inquiry jurisdiction" of 28 U.S.C. 2282 and 2284. Noting that the complaint alleged that Rule XI had been construed by the Committee to permit "the exposure of witnesses, including plaintiffs, to public scorn and obloquy and harassment and intimidation of these witnesses without any legislative purpose but rather to chill and deter them and others in the exercise of their first amendment rights," a majority of the court

concluded that the suit raised "a substantial constitutional question not foreclosed by the Supreme Court in *Barenblatt* v. *United States,* 360 U.S. 109," and thus warranted the convening of a three-judge court.

In the subsequent proceedings before the three-judge district court, appellants were permitted to add the Attorney General of the United States and the United States Attorney for the Northern District of Illinois as defendants, in order to assure them the possibility of effective relief on their prayer for an injunction against the then pending prosecutions.[4] Answers to the complaints were filed in December 1967 and January 1968; they asserted the official nature of the acts done[5] and reiterated comprehensive challenges to the jurisdiction of the court and the justiciability of the issues presented,[6] which had been raised previously in unsuccessful motions to dismiss.

[4] H. Res. 1060, 1061 and 1062, 89th Cong., 2d Sess. (1966), 112 Cong. Rec. 27439, 27486, 27500, 27641, directed the Speaker of the House to certify appellants' conduct to the United States Attorney for the Northern District of Illinois; the matters were presented to a Chicago grand jury and indictments were returned on July 18, 1967. Trials on these indictments are now pending.

[5] Answer of the congressional defendants, *passim*.

[6] "Affirmative Defenses and Objections to All Complaints and Amended Complaints as Amended and Supplemented:

* * * * * * *

"2. This Court lacks jurisdiction over the subject matter.

3. This Court lacks jurisdiction over the parties defendant.

4. There has been no sufficient process served on any of the defendants.

5. Venue does not lie in the Northern District of Illinois.

6. The complaints and intervening Complaints, and all amendments and supplements thereto, taken either indi-

Appellants then moved for production of documents (Committee records) and served a first set of interrogatories and subpoenas to take depositions of members of the staff of the Committee. Appellees opposed the interrogatories and motion for production of documents, and moved for summary judgment.

In March, 1968, the court entered an order requiring the Committee to answer interrogatories and produce records covering a ten-year period, without ruling on the motion for summary judgment. The congressional appellees then moved, *inter alia,* to stay all discovery against them and to dismiss the consolidated suit against them by reason of their immunity under Article I, Sec. 6, Cl. 1, of the United States Constitution; this motion was supported by a "Claim of Privilege and Exemption from Suit" from each of the nine congressional defendants (5 R. 87–89). The outcome of this motion was the decision and opinions of June 26, 1968, in which the court gave summary judgment for the congressional appellees on their claim of privilege, and dismissed the action as to the prosecutorial appellees as "ancillary."

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vidually or as a whole, fail to state a claim upon which relief can be granted.

7. The plaintiffs have an adequate remedy at law by defense of their pending criminal cases.

8. All issues are moot.

9. The three-judge court has no jurisdiction to grant mere declaratory relief."

Id., p. 24. The answer of the prosecutorial defendants adopted the answer of the congressional defendants.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE THE THREE-JUDGE DISTRICT COURT LACKED JURISDICTION OF THE PROCEEDINGS

The only legislative action which appellants challenge as unconstitutional and whose enforcement, operation and execution they seek to restrain is Rule XI, Section 18, of the Rules of the House of Representatives. It is this rule which confers the challenged authority of the Committee to make investigations. However, 28 U.S.C. 2282, on which appellants rely in their demand for a three-judge district court, applies in terms only to an "Act of Congress" (capitalization in the original). The House Rule is not an Act of Congress, and therefore the three-judge district court was improperly convened. *Krebs* v. *Ashbrook,* 275 F. Supp. 111, affirmed *per curiam,* No. 21,382, C.A.D.C., decided May 14, 1968; *Powell* v. *McCormack,* 395 F. 2d 577, 603, n. 54 (C.A.D.C.), petition for certiorari pending, No. 138.

The result is not changed because of the historical accident that the House Rule was once embodied in the Legislative Reorganization Act of 1946, 60 Stat. 812 (which was passed by both houses of Congress and signed by the President), or because the Committee itself has often cited that Act as a source of its authority. The district court opinion in *Krebs* correctly points out, we believe, that the effect of that action was dubious even for the term of Congress in which the statute was enacted. The Act states regarding the rules, such as Rule XI, that they

> * * * are enacted by the Congress:
>
> (a) As an exercise of the rule-making power of the * * * House of Representatives, respectively * * *
>
> (b) With full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House. [60 Stat. 814].

This caveat, possibly required by Article I, Section V of the Constitution,[7] deprives the rules of the legislative force ordinarily associated with statutes, whose terms cannot be changed by the action of a simple majority of one House.[8]

Moreover, whatever effect the Reorganization Act might have been deemed to have had for the session at which it was enacted, it is no longer the operative source of the Rules of the House of Representatives. "Neither the House of Representatives nor its committees are continuing bodies." Cf. *Anderson* v. *Dunn,* 6 Wheat. 204, 231; *Marshall* v. *Gordon,* 243 U.S. 521, 542. It is the practice of the House to adopt its Rules—including the Rule which establishes the Un-American Activities Committee and defines the scope of its authority—at the beginning of each Congress." *Gojack* v. *United States,* 384 U.S. 702, 707 n. 4; see also, *Barenblatt* v. *United States,* 360 U.S. 109, 115.

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[7] "Each House may determine the Rules of its Proceedings * * *."

[8] To treat a Rule as embodied in the Reorganization Act as an "Act of Congress" for the purpose of Section 2281, but not later amendments added by the House alone, would create an anomalous situation not easily resolved in practice.

and *Watkins* v. *United States,* 354 U.S. 178, 201–203. Although in adopting its rules the House may incorporate by reference the provisions of earlier rules and the Reorganization Act—*e.g.,* H. Res. 8, 89th Cong., 1st Sess., 111 Cong. Rec. 21, 25, the source of the Committee's authority in the present case—the current resolution is the operative act; the adoption of prior rules is itself an exercise of the constitutional authority of the House to make its own rules, and hence the only appropriate point of challenge.[9]

Passed by one house of Congress alone, without Presidential approval, these resolutions do not qualify as "Act[s] of Congress." There is no warrant for construing those words in Section 2282 as encompassing all legislative actions, and enlarging the category of cases where three judges are required and an appeal of right to this Court is allowed. See *Swift & Co.* v. *Wickham,* 382 U.S. 111, 128. Like its complement, Section 2281 (*Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154), Section 2282 is "not * * * a measure of broad social policy to be construed with great liberality, but * * * an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States,* 312 U.S. 246, 251. Just as the word "statute" in Section 2281 has not been expanded to include local ordinances or even enactments of the

[9] The Committee's frequent reference to the Reorganization Act as the source of its authority, "understandable as it is, does not constitute an analysis of the legal situation." *Krebs, supra,* 275 F. Supp. at 117. In *Gojack, supra,* at 706–707, n. 4, this Court rejected the notion that an authorization of a Committee investigation by a previous Congress might carry forward without renewal into a succeeding term. House rules equally require such renewal if they are to have force.

State legislature having only local application (*e.g., Moody* v. *Flowers,* 387 U.S. 97), so here, the term "Act of Congress" can not appropriately be read to encompass rules promulgated by one House governing only its own internal procedures.

The result we suggest is fully consistent with the limited purpose of Section 2282. The provision was designed to protect federal regulatory schemes, chiefly of an economic nature. *Kennedy* v. *Mendoza-Martinez, supra,* at 154–155. No "regulatory scheme" is involved here. Rather, plaintiffs seek to enjoin the exercise of legislative powers. That the resulting disruption would be objectionable may be, as we argue below, a reason to deny the possibility of prior restraint of the Congress or its members. But it is not the problem with which Congress was concerned when it enacted Section 2282, and that statute does not apply to this case.

If we are correct in our conclusion that this was not an action "required * * * [to be] heard and determined by a district court of three judges," the appeal does not lie here under 28 U.S.C. 1253. Nor is there any other basis for a direct review by this Court.[10] Accordingly, the present appeal may be dismissed for

[10] Certiorari before judgment under 28 U.S.C. 1254(1) would not seem available here since the case, at this point, is in no sense "in the court of appeals." Moreover, even if the case were there, it is doubtful whether this Court could properly treat the papers filed here as petitions for certiorari, in the absence of such a timely prayer. 28 U.S.C. 2103 is inapplicable because these are not appeals "improvidently taken from the decision * * * of a United States court of appeals." So far as we are aware, the Court has never assumed that alternative certiorari jurisdiction existed when it determined that it lacked jurisdiction on direct appeal because a three-judge court had been im-

lack of jurisdiction. We note, however, that the time within which to perfect appeals to the court of appeals has now passed and that appellants' failure to follow that course is explained by that court's erroneous ruling that the case must be heard by a statutory court of three judges, from whose decision the appeal would lie here. In the circumstances, it may be appropriate to vacate the judgment below so as to permit the entry of a fresh decree by a single district judge from which appellants may perfect a timely appeal to the Seventh Circuit. See, *e.g.*, *Moody* v. *Flowers*, *supra*, 387 U.S. at 104.

II. IN THE ALTERNATIVE, THE JUDGMENT BELOW SHOULD BE AFFIRMED

Appellants have proceeded against both congressional and prosecutorial defendants, seeking relief both from specific consequences of the Chicago hearings and from unspecified, future hearings which they anticipate will be conducted by a like-minded Committee under a grant of authority identical to that which governed the Committee during the 89th Congress. For purposes of analysis, it will be helpful to deal separately (1) with the two heads under which relief is sought and (2) with the two classes of defendants against which relief is sought.

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properly convened. See, *e.g.*, *Phillips* v. *United States*, *supra*, 312 U.S. at 254; *Moody* v. *Flowers*, *supra*, 387 U.S. at 104. At all events, we do not believe the special circumstances warranting certiorari before judgment are present here. See Rule 20 of the Rules of this Court. Cf. *Powell* v. *McCormack*, 387 U.S. 933.

A. RELIEF FROM THE EFFECT OF THE CHICAGO HEARINGS

With specific respect to the Chicago hearings, appellants sought to restrain the holding of the hearings, to quash the subpoenas issued against them, to declare the hearings (and the rule under the authority of which they were conducted) void, and to restrain their indictment and prosecution for any contempt alleged to have been committed at the hearings.

(1) With respect to the congressional defendants, these demands are moot

The Committee has already reported appellants' alleged contempts to the House of Representatives, which has by resolution directed the Speaker to certify them to the United States Attorney, and the Speaker has done so. The term of the 89th Congress has ended and, with it, any possibility of contempt proceedings against appellants before the House itself. *Anderson* v. *Dunn,* 6 Wheat. 204, 231. There is nothing more the Congress or the Committee could do with respect to the Chicago hearings; consequently, there is no viable claim for equitable relief against the congressional defendants. The matter is entirely out of their hands.

(2) With respect to the prosecutorial defendants, all these matters are competent to be raised at appellants' trials for contempt, and there has been no showing of the extraordinary circumstances required to justify equitable relief in advance of those trials

This Court has stated and reaffirmed "[t]he general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional." *Speilman Motor Sales* v. *Dodge,* 295 U.S.

89, 95; *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163–164; *Dombrowski* v. *Pfister,* 380 U.S. 479, 484–485. An exception has been recognized "on a showing of danger of irreparable injury 'both great and immediate,' " 319 U.S. at 164, but threats of the type of injury "incidental to every criminal proceeding brought lawfully and in good faith" are insufficient to make such a showing. *Ibid.*

Appellants rely upon *Dombrowski* v. *Pfister, supra,* and similar cases in arguing that they fall within the recognized exception. It is true that their case also involves allegations of a "chilling effect" on appellants' and others' exercise of their First Amendment rights, and assertions that this effect is the result of an overbroad enactment uncontained by acceptable narrowing constructions. However, appellants' case fails to match the circumstances of *Dombrowski* and like cases in one crucial respect: the allegations of "chill" entirely lack the personal concreteness which has characterized such allegations in previous cases where the Court has found "a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights," 380 U.S. at 485.[11] Thus, in *Dombrowski,* there was an

[11] It is also significant that in each of the previous cases, the statute challenged as vague directly governed the conduct of those subject to it. The rule here, on the other hand, establishes no rules of conduct as to which there might be misapprehension, but simply enables the Committee to carry on legislative business. Like the Constitution or a corporate charter, its terms are necessarily copious. As this Court has recognized, *Watkins* v. *United States,* 354 U.S. 178, 209, *Barenblatt* v. *United States,* 360 U.S. 109, 116–117, *Wilkinson* v. *United States,* 365 U.S. 399, 407–408, Communism is a legiti-

active threat of repeated arrests, seizures, and prosecutions of appellants under the challenged statute; in *Terrace* v. *Thompson,* 263 U.S. 197, there was a serious cloud imposed on plaintiff's property rights by the threat of prosecution; in *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519 (C.A.D.C.), plaintiff feared a multiplicity of prosecutions in distant venues as a result of his distribution of allegedly obscene matter through the mails; multiplicity of prosecutions, and the high penalties entailed, were also decisive in *Ex parte Young,* 209 U.S. 123; see also, *United States* v. *Wood,* 295 F. 2d 772 (C.A. 5).

In contrast, appellants show no concrete basis for personal fear of the future. There is no hearing pending at which appellants are required to appear, nor has any showing been made that they are particularly likely to be called before any hearings which might be held in the future. Indeed, one cannot predict what authority the 91st Congress or its House of Representatives will confer upon the Committee on Un-American Activities, who among the members of that Congress will be appointed to that Committee, whether they will authorize any investigations, on what subjects and in what manner they will conduct them, and whom they will call to testify. Thus, appellants are subject to no overhanging threat of future action against them such as has characterized previous cases where injunctive relief against prosecution has been considered. No substantial impairment of appel-

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mate subject for legislative inquiry; any "vagueness" in Rule XI can be overcome by Committee adherence to fair procedure; and the propriety of a particular inquiry is to be judged by the practice of the Committee making it, not by its charter.

lants' rights can be expected if they await disposition of the criminal charges and subsequent review of any conviction, and no substantial benefit will accrue to them if the injunctive relief desired is afforded.[12] In sum, no sufficient basis for injunctive interference with the trial of the pending contempt indictments has been shown.

B. RELIEF FROM ANY PROCEEDINGS UNDER RULE XI IN THE FUTURE

In addition to the specific relief requested with respect to the Chicago hearings, appellants sought to restrain defendants, their agents, employees, attorneys and successors, "from the enforcement operation, or execution in any way whatever" of the Rule establishing the House Committee on Un-American Activities; in addition, they sought a declaratory judgment that the Rule is void.

(1) As to the congressional defendants, these prayers for relief should not be entertained

The propriety of injunctive relief against the Congress or some of its members[13] turns on considerations

[12] In *Dombrowski*, this Court was concerned with federal interference in a State prosecution, and to that extent its decision accommodated considerations of federalism absent in the present case. It has been assumed, however, that the decision is equally applicable to injunctions sought against federal criminal prosecutions. *Reed Enterprises* v. *Corcoran*, *supra*. There is, if anything, less reason to interfere where, as here, trial and appeal will be in courts particularly well acquainted with enforcement of federal rights; there is no reason to adopt a more permissive standard for injunctive relief.

[13] The complaints name as defendants only the Congressmen who were members of the Committee when the complaints were filed, some of whom are no longer members of Congress. The

of justiciability and separation of powers, as well as legislative privilege. "It seems quite clear that as a matter of basic general principle a court cannot interfere with or impede the processes of the Congress by proscribing anticipatorily its inquiries. This is so not only from the viewpoint of the Constitutional separation of powers between two branches of the Government but also from the practical viewpoint of simple procedural efficiency." *Pauling* v. *Eastland,* 288 F. 2d 126, 128–129 (C.A.D.C.), certiorari denied, 364 U.S. 900; cf. *Yellin* v. *United States,* 374 U.S. 109, 121; and see *Fischler* v. *McCarthy,* 117 F. Supp. 643 (S.D. N.Y.), affirmed on other grounds, 218 F. 2d 164 (C.A. 2d); *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729 (D.D.C.). The fact that such relief has not previously been granted, nor its availability directly ruled upon by this Court, is itself an indication of its extraordinary nature. "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Mississippi* v. *Johnson,* 4 Wall. 475, 500. Whatever might be the case should one or more Congressmen, with or without congressional sanction, set themselves up in a

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prayers for relief, however, implicate a larger group: agents, employees, attorneys, others acting in concert with them, and successors. One could not now be certain that if, for example, the House sought to readopt Rule XI after an injunction had been entered, each Congressman involved would not be an other "acting in concert." At all events, it is plain that the Congressmen were being sued in their official capacity.

plainly non-legislative enterprise, the prospective investigations of Communism which appellants seek to enjoin reflect legitimate legislative concern and inquiry. *McGrain* v. *Daugherty,* 273 U.S. 135, *Barenblatt* v. *United States,* 360 U.S. at 117–123; hence claims for prior restraint of such inquiries should not be entertained. Cf. *Hutcheson* v. *United States,* 369 U.S. 599, 619 (opinion of Harlan, J.).

Even putting aside appellants' lack of concrete interest in the questions they seek to raise, the contemplated litigation is essentially abstract. As we have already noted, appellants cannot know whether there will continue to be an Un-American Activities Committee, what its authority and internal rules of procedure will be, who will be its members, what if any investigations they will authorize concerning what subjects of inquiry, whom they will call, and how they will in fact conduct themselves. Consequently, their action, if allowed, will accomplish little more than to put a Committee of the House of Representatives on trial, as it were, for its claimed past excesses and those of its predecessors. Cf. *Tenney* v. *Brandhove,* 341 U.S. 367, 377.

To the extent it is distinct from the arguments just outlined (which have been presented throughout this litigation), the defense of the congressional appellants based upon the Speech and Debate Clause arose when appellants' proposed discovery made it apparent that there would be large-scale interference with congressional business if the orders to produce were to be complied with and the interrogatories answered.[14]

[14] "The Clause confers personal immunity on each Member of the House, but it is not a strictly personal right since its purpose

We suggest that these effects argue strongly for the conclusion reached below—at least where, as here, a preliminary determination has been made on the basis of public records that the legislature or its arm has been acting within the sphere of legislative competence. The Congress has "the right * * * to pursue its legislative duties without judicial interference. * * * The courts have no power of interference, unless and until some event, such as arrest, indictment or conviction, brings an actual controversy into the sphere of judicial authority. The courts cannot interfere merely upon the petition of a person potentially liable to some such event. It is clear * * * that the doctrine of the separation of powers prevails here." *Pauling* v. *Eastland, supra,* 288 F. 2d at 129. That rule, announced in a case where the court was declining to grant an injunction against enforcement of an *outstanding* subpoena of a Senate committee, is especially persuasive here, where no adverse action against appellants is in current prospect.[15]

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is to protect the legislative process * * *" *Powell* v. *McCormack*, *supra*, 395 F. 2d at 599. Accordingly, appellants' argument that the right was waived when not raised in the answer is wide of the mark. A Congressman could not by negligence or even advertent silence waive a right that is not his alone.

[15] In none of the cases appellants cite was the claim for relief based upon as abstract a situation as now obtains with respect to the congressional defendants in this case, or directed against the Congress. Thus, in *Luscomb* v. *Bowker*, 334 Mass. 468, 136 N.E. 2d 192, the plaintiff sought to prevent publication of her name in a pending committee report; *Bond* v. *Floyd*, 385 U.S. 116, concerned a continuing dispute over plaintiff's right to a seat in the State legislature; *Dombrowski* v. *Pfister*, *supra*, involved an active threat of continued enforcement.

Declaratory relief holding Rule XI to be invalid so far as it concerns the Committee (even assuming it would be appropriate for a three-judge district court to grant, but see *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154), would be no more appropriate than the injunctive relief appellants seek. True, it avoids the embarrassment to the Speech and Debate Clause which would be implicit in an injunction, with its threat of imprisonment or fine as penalty for disobedience. However, it still puts the federal courts in the untenable position of voiding a congressional rule on the basis of a prediction how a congressional committee will behave in the future, on behalf of plaintiffs who are not subject to an immediate threat. Judge Prettyman has forcibly stated one of the considerations underlying the rule against declaratory relief in this situation (*Pauling* v. *Eastland, supra,* 288 F. 2d at 129–130):

> Although on argument here Pauling concedes that he could not obtain from a court an injunction against the contemplated action of the Senate Subcommittee, or of the Senate, he contends that a declaratory judgment in respect to his rights and in respect to the validity of the contemplated action would not really interfere with the Senate. But such a differentiation seems to me to be without substance. It is unthinkable to me that, if the courts should hold a specific directive of a Committee of the Congress unconstitutional and void, the Committee would nevertheless attempt to enforce that directive. So, as I view it, a declaratory judgment would be as effective an impingement

upon and interference with legislative proceedings as a flat injunction would be. Thus I think that a declaratory judgment respecting the validity of contemplated Congressional action would violate the doctrine of the separation of powers and would be an illegal impingement by the judicial branch upon the duties of the legislative branch.

In this context, courts should insist upon a strong showing of the "actual controversy" required by the Declaratory Judgment Act, 28 U.S.C. 2201, before intervening. That ingredient is lacking from the action against the congressional appellees,[16] and the claim against them for declaratory relief was properly denied. See *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273.[17]

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[16] Whether the requested declaratory judgment would be appropriate as against the prosecutorial appellees in connection with the pending indictments is a question to be decided on the same basis as appellants' request for injunctive relief against that prosecution. *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431, and cases cited. See discussion, *supra*, pp. 13–16.

[17] Two recent decisions in which actions for declaratory relief were sustained against challenge reveal concrete interests on the part of the plaintiffs which are lacking from the action against the congressional appellees. In *Evers* v. *Dwyer*, 358 U.S. 202, plaintiff was told that his color required him to sit in the rear of a bus and he was threatened with arrest; the record showed that the bus company and municipal officials intended to continue actively the enforce the State statute requiring such segregation until its constitutionality had finally been adjudicated. In *Beacon Theatres* v. *Westover*, 359 U.S. 500, plaintiff had been directly threatened with treble-damage actions under the Antitrust Laws, and suffered continuing impairment of its business.

(2) As to the prosecutorial defendants, these prayers were properly dismissed as ancillary

Appellants' chief reliance regarding the dismissal of the action against the Attorney General and the United States Attorney is on two cases in which this Court sustained actions against congressional staff members, while dismissing actions against members of Congress, *Kilbourn* v. *Thompson,* 103 U.S. 168, and *Dombrowski* v. *Eastland,* 387 U.S. 82. In both cases the Court refused to permit the staff members to claim privilege under the Speech and Debate Clause, and allowed the suit to proceed insofar as it sought a damage recovery against them for the wrongs which they, as individuals, had allegedly committed. We agree that the prosecutorial appellees cannot claim the shelter of the Speech and Debate Clause. But we submit that these members of the Executive Branch are not proper defendants on the claims for broad relief against the future operation of the Committee under Rule XI.

The ancillary nature of the claims against the prosecutors was conceded in appellants' successful argument to the court below on their motion for joinder. Their argument, made after it had been determined to seek an indictment on the basis of the House Resolutions, was that joinder was necessary to secure them complete relief, Fed. R. Civ. P. 19(a), by protecting them against prosecution for the contempts they were alleged to have committed. Protection against the pending prosecutions was the possible remedy available as against the prosecutors, and the only relief requested against them.

It is plain that the Attorney General and the United States Attorney for the Northern District of Illinois would not be proper parties to a suit seeking only declaratory and injunctive relief against the future operation of the Committee under the authority of Rule XI. Neither official is in any way connected with the Committee or charged with administration of the Rule. Their participation becomes relevant, if at all, only when, as in the present case, the Committee has successfully moved the House of Representatives to seek a contempt prosecution of some person alleged to have been contemptuous of the Committee during the course of a hearing under the Rule. If relief against future operation of the Committee under Rule XI were granted against them, it could have no more than the peripheral effect of denying the Committee access to the courts in contempt matters.[18] Thus, the suit was properly dismissed in this respect once it had been determined that it would not lie against the congressional defendants. *Williams v. Fanning*, 332 U.S. 490, 494; *Dombrowski v. Burbank*, 358 F. 2d 821, 823 (C.A.D.C.).

[18] The House retains power directly to punish for contempt. *Anderson* v. *Dunn*, 6 Wheat. 204; *Jurney* v. *MacCracken*, 294 U.S. 125.

CONCLUSION

For the reasons stated, these appeals should be dismissed,[19] or the judgment below affirmed.

Respectfully submitted.

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[19] As noted earlier (*supra*, p. 12), if the Court should conclude that it lacks jurisdiction to reach the merits, it may deem it appropriate to vacate the judgment below to preserve appellate remedies, rather than simply dismiss the appeals.

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